



PROTECT THE RIGHTS OF WOMEN AND CHILDREN OPPOSE H.R. 5

July 25, 2005

Dear Representative:

We write to express our concerns about the HEALTH Act of 2005, H.R. 5. Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's and consumer advocacy organizations that works to advance the cause of justice for all Americans. Public Advocates is a nonprofit that strives to overcome the persistent, underlying causes of poverty and discrimination and to strengthen the voices of the poor, people of color, and immigrants in public policy. We oppose the bill because if enacted into law, it would create an unequal system of justice for the most severely injured patients as well as for consumers of defective drugs and medical devices. The unfairness would fall most harshly on children and women, particularly elderly women.

H.R. 5 imposes a cap on non-economic damages. Law professor Lucinda M. Finley conducted a comprehensive study of medical malpractice and other tort cases in states that have similar non-economic damage caps. Her research revealed that these caps caused significant inequalities in compensation for negligently injured women and seniors. Her analysis showed that women and the elderly lose a much higher percentage of their total compensation for their injuries when non-economic damages are capped than men do, with elderly women the greatest losers.

While there was a gender and age disparity before caps were imposed in these states, after caps were imposed, the gap grew. The reason is that children, women and the elderly receive a greater portion of non-economic damages when negligently injured than men do. Many injuries suffered by women do not have high economic value in the market sense such as loss of fertility and pregnancy. Yet juries recognize the precious value of the ability to have a child and compensate women for such injuries. The same holds true for injuries suffered by senior citizens such as nursing home abuse because the elderly will not lose wages when injured and thus are compensated almost entirely by non-economic awards.

Just this month, the Supreme Court of Wisconsin declared the state's cap on non-economic damages in medical malpractice cases unconstitutional. In determining that the cap violated the equal rights protections of the Wisconsin Constitution, the court noted

Page Two

that young people are most negatively affected by the cap. The court stated, “The legislature enjoys wide latitude in economic regulation. But when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear to be rational.” *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (July 14, 2005) at 48.

We are also concerned about the broad scope of those whose liability will be limited under H.R. 5. Doctors are the public face of the legislation, but the proposal also extends protections to HMOs, drug companies, nursing homes, medical device manufacturers and the insurance industry. Drug companies and medical device makers get special protection through a provision that provides a shield against liability for drugs and products that have FDA approval. Given the recent disclosures about the FDA’s handling of dangerous drugs such as Vioux, it makes no sense to let drug companies off the hook just for complying with government regulations. History has made evident in that without a significant threat from the civil justice system, manufacturers will take more risks with public safety in the race for higher profits. Many of the worst examples have been products marketed to women such as silicone breast implants, diet drugs and birth control devices.

We appreciate the legitimate concern that many in Congress have for escalating medical malpractice premiums. We support efforts to make sure our doctors are not held hostage by the investment cycles of the insurance industry. But study after study has confirmed that damage caps do not lower malpractice insurance rates. We also support proposals to encourage the medical professional to weed out and punish the few doctors who commit repeated incidents of malpractice. Finally, we support measures to encourage parties to resolve their differences without resorting to litigation.

We stand ready to work with you to address these issues in a way that preserves the right of a person who has been hurt by wrongdoing to have a jury make a careful and realistic determination about the amount of compensation for the injury on a case-by-basis basis according to the extent and seriousness of the harm.

If you have any questions, please contact Sandy Brantley, Alliance for Justice, 202.822.6070., Ext. 1354.

Sincerely,

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